Supreme Court, U.S.
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No. 71-953

In the

Supreme Court of the United States

October Term 1971

BETTY JOHNSON, a feme sole

Petitioner,

v.

BELVA REED, et vir

Respondents.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion on appeal of this case is reported as *Johnson v. Reed*, 464 S.W. 2d 689, er. ref. n.r.e.

JURISDICTION

This Court has no jurisdiction because the Petition for Certiorari was not filed within the time prescribed by 28 U.S.C., § 2101 (c), not being within 90 days after entry of the final judgment or decree sought to be reviewed. Cf. *Rust Land, etc., Co. v. Jackson*, 250 U.S. 71, 63 L. Ed. 850;

Tweed Shoe Co. v. Computing Scale Co., 261 U.S. 399, 67 L. Ed. 716 etc. No extension of time has been sought or obtained.

The state court judgment for Respondents rendered by the district court was affirmed by the Court of Civil Appeals, motion for rehearing overruled by that court, application for writ of error refused, and motion for rehearing on the application was overruled by the Supreme Court of Texas on October 6, 1971, the judgment thus becoming final in the state courts on October 6, 1971. The notice delivered to Respondents by counsel for Petitioner states that the Petition for Certiorari was presented and docketed on January 28, 1972, well over 90 days from October 6, 1971.

The "Motion to Issue Certificate of No Mandate Pending Writ of Certiorari in United States Supreme Court" filed in the Court of Civil Appeals after October 6, 1971, was pointless and inappropriate, and action thereon did not and could not affect the finality of the judgment, which was already established by the final action of the Supreme Court of Texas on October 6, 1971. (A copy of Answer of Appellees to Motion to Issue Certificate of No Mandate is attached hereto as an appendix.) Cf. *F.T.C. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 97 L. Ed. 245.

Where the highest state court has jurisdiction to review a decision of a lower state court but refuses to do so, the time runs from the date of the refusal to review. *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21. That refusal by the Supreme Court of Texas occurred with its refusal of the

application for writ of error with the notation "no reversible error," on July 14, 1971, becoming final when that court overruled motion for rehearing on the application on October 6, 1971.

It also appears that Petitioner has not brought up the record of testimony and proceedings in the trial court at all, although it is on file in the Court of Civil Appeals and readily available. Moreover, Rule 21(1) requires petition for certiorari to be served on opposing counsel *before* it is filed, and here copy of the petition was not served upon counsel for Respondents until noon, January 26, 1972, although it appears to have been presented and docketed on January 25, 1972.

QUESTION PRESENTED

Whether the Constitution of the United States requires that a party plaintiff in a state court be allowed completely unlimited voir dire examination of the jury panel with no discretion at all in the trial judge to exercise reasonable control.

STATEMENT OF THE CASE

This is a motor vehicle personal injury case tried before a jury, which returned a verdict in favor of Respondents. Judgment was entered accordingly by the district court, affirmed by the Court of Civil Appeals, application for writ of error refused by the Supreme Court of Texas, and motion for rehearing on such application overruled. There is no

contention that the evidence did not support the findings for Respondents, and the only complaint is of claimed improper restriction of voir dire examination of the jury panel.

ARGUMENT

The trial court acted within its permissible range of discretion in declining to allow Petitioner's counsel to examine jurors in detail on voir dire as to possible connections with the insurance industry through family, friends or associates, after exhaustively examining them as to any possible connections of their own with that industry. Further, Petitioner has shown no probable harm from the lack of an even longer examination of the jury panel as to such collateral connections with the insurance industry, especially since full examination was allowed as to any possible personal connections of the jurors themselves with such industry. Similarly, the trial court did not unduly or erroneously restrict Petitioner's counsel in examination of the jury panel in other respects claimed and again no probable harm from such other rulings as to voir dire was shown.

Federal practice itself, like the state practice in Texas, regards the course and extent of voir dire examination as matters within the discretion of the trial court. F.R.C.P. 47(a); *Bass v. Dehner*, 103 F. 2d 28; *Braman v. Wiley*, 119 F. 2d 991; *Strickland v. Perry*, 244 F. 2d 24; *Lentner v. Lieberstein*, 279 F. 2d 385; etc.

This Court in *Connors v. U.S.*, 158 U.S. 408, 39 L. Ed. 1033, says of voir dire:

> "That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. *This is the rule in civil cases*, and the same rule must be applied in criminal cases."

Fredrick v. U.S., 163 F. 2d 536, cert. den. 332 U.S. 775, 92 L. Ed. 360, accordingly declares:

> "Furthermore, considerable discretion is lodged in the court as to questions that are to be asked on voir dire."

Duff v. Page, 249 F. 2d 137, dealing with plaintiff's complaint of exclusion from voir dire of inquiry into ownership of stocks or bonds in an insurance company, declares:

> "We do not reach the merits of this specification, however, unless there is reason to believe that the refusal to ask this question on voir dire was prejudicial. Trial court action, however erroneous it may be, is not ground for reversal unless such action is inconsistent with substantial justice."

Rule 61, F.R.C.P., was cited in this connection. The court assumed for purposes of discussion that the insurance company named in the proposed question had an interest in the case and that one or more jurors may have been bond holders or stock holders of that company, but goes on to say:

> "The jury was not told that American Casualty Co., or any other insurance company, was involved. On voir dire, the jurors gave assurances that none of them had previously heard of the case. If the jurors did not know that this company was involved in the case, their pos-

> sible ownership of bonds or stocks of that company could not have influenced the verdict rendered. We therefore hold that failure to interrogate the jury in the manner requested was not prejudicial."

Of course in the present case, full inquiry into any possible insurance connections of the prospective jurors themselves was allowed, the only restriction being to the extension of such inquiry to relatives, friends or neighbors of the panel who had ever been connected "in any way" with the insurance industry.

Langley v. Turner's Express, Inc., 375 F. 2d 296, in affirming judgment for defendants over complaint of the refusal of the trial court to question the panel as to whether they were in any manner interested in any liability insurance company, declares:

> "Although denial or impairment of the right to challenge peremptorily is reversible error without a showing of prejudice, Swain v. State of Alabama, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), reasonable restraint of questioning is not — absent a showing of prejudice. Duff v. Page, 249 F. 2d 137, 139 (9th Cir. 1957); Smedra v. Stanek, 187 F. 2d 892, 895 (10th Cir. 1951); Fed. R. Civ. P. 61.
>
> * * * * *
>
> We must strike a balance between the probability of danger to plaintiffs that someone sympathetic to insurance companies may remain on the jury and the danger to defendant that the jury may award damages without fault if aware that there is insurance coverage to pay the verdict. We think the latter danger is greater than is the former, * * *.
>
> * * * * *
>
> The proper scope of questioning on voir dire is ordinarily within the sound discretion of the district judge.

> Absent a showing of compelling need to propound such questions, we think the district judge clearly correct in refusing them. Here there is no showing of prejudice and no abuse of discretion. See Hebron v. Brown, 248 F. 2d 798 (4th Cir. 1957); Smedra v. Stanek, 187 F. 2d 892, 895 (10th Cir. 1951); 31 Am. Jur. Jury § 209, at 178 (1958); 50 C.J.S. Juries § 274(c) (2), at 1046-1051 (1947)."

The first quoted paragraph makes the vital distinction between the cases cited by Petitioner and the instant case.

In *Hinkel v. Hampton*, 388 F. 2d 141, an automobile collision case in which judgment for defendant was affirmed, complaint was made of the refusal of the trial court to ask on voir dire requested questions which sought to probe possible connection of jurors with insurance generally. The court stated that "the issue is whether such questions must be given in every injury case regardless of the particular circumstances and regardless of possible prejudice." In answer, it declared:

> "The general rule is that the scope and extent of the voir dire questioning rests in the sound discretion of the trial court."

The opinion cites *Smedra v. Stanek*, 187 F. 2d 892, which pointed out that there had been no showing that any juror knew that an insurance company had an interest in the case or was defending it and said:

> "Under these circumstances, it cannot be said that the court's refusal to examine a jury with respect to this matter was such an abuse of discretion as to require a reversal."

The court in *Hinkel v. Hampton* goes on to say, "Other circuits have also held that the matter is one of discretion." To that effect, it cites *Louisville & Nashville R. Co. v. Williams*, 370 F. 2d 839 (5th Cir.); *Langley v. Turner's Express, Inc.*, 375 F. 2d 296; and *Lentner v. Lieberstein*, 279 F. 2d 385. It then held that since the matter was one properly in the trial court's discretion, "we conclude that there was no error."

Even in a criminal case, it has been stated:

> "The questions that should be asked upon a voir dire examination is a matter of discretion; and that discretion belongs to the trial court, not to us. Ours is the duty only to examine the record to determine whether that discretion has been abused."

Spells v. U.S., 263 F. 2d 609, cert. denied 360 U.S. 920.

The good faith of Petitioner's counsel in seeking inquiry of a possible prejudicial nature was for the trial court to judge, and that court may well have considered that Petitioner's real concern was not to seek a basis for exercising strikes because of fear of prejudice but rather to conduct extended examination about insurance connections in order to plant the idea of insurance in the minds of the jury and imply that Respondents were protected by insurance.

Petitioner does not contend that there was any abuse of discretion but rather merely that the trial court's rulings were unconstitutional. There has been no showing that because of the rulings complained of Petitioner was forced to take any objectionable juror, and there is nothing in the record to indicate that any juror who sat on the case was

biased, prejudiced, or disqualified in any way. At the hearing on motion for new trial, Petitioner was entitled to put the jurors on the stand and ask them the questions as to collateral insurance connections and show that they had such connections in fact, if they did, and then that counsel had strikes available and would have struck them. No great expense would have been involved, but that was not done. There was no intentional exclusion of certain categories of people from the jury list here, and certainly no showing of intentional inclusion of persons with insurance connections.

Petitioner's counsel was allowed to examine the jury panel here for over 40 printed pages (Jury Voir Dire, pp. 1-41), so that it certainly cannot be said with any cogency that he was substantially denied the right to question the panel. Moreover, the constitutional grounds now urged were not raised in the trial court nor as points of error in the Brief of Appellant in the Court of Civil Appeals.

The Petition refers to the attempt of Petitioner's counsel to inquire as to the standards, methods, and other criteria used by one member of the panel "to approve or reject applications or claims made by prospective policyholders" of her insurance company employer. The prospective juror in question was Mrs. Slovak. However, Petitioner fails to note that Mrs. Slovak did not sit on the jury that tried the case, so that Petitioner could not have been harmed by any prejudice on her part which counsel was prevented from discovering through further inquiry

as to her methods or standards in checking applications for health insurance. Mrs. Slovak was an insurance underwriter for Union Bankers Life, stating, "I am an underwriter, underwrite health insurance." Jury Voir Dire 23. Contrary to Petitioner's implications, she handled only applications for health insurance and had nothing to do with claims, stating "I don't handle claims." Jury Voir Dire 25. Mr. Delk did examine her as to her handling of applications at great length, from Jury Voir Dire 25, 1.8, through 26, 1.7, before the trial court indicated that he had gone into the matter in sufficient depth. The detailed standards used by Mrs. Slovak as an underwriter in processing applications for health insurance had no bearing on her qualifications to sit in a negligence case, and in any event she did not sit.

Petitioner also complains of not being allowed to ask Mrs. Slovak, "Would you want someone like yourself to sit on a jury if you were having a case like Mrs. Johnson, an automobile accident with injuries that she is claiming?" However, Mr. Delk did ask that very question, and she answered in the affirmative. The court merely commented thereafter that perhaps such question was going too far and the court should not have asked it of a previous juror:

> MR. DELK: All right, in those circumstances knowing all that, do you think that you could be unbiased in this case?
>
> MRS. SLOVAK: Yes, sir, I do.
>
> MR. DELK: You do. Would you want someone like yourself to sit on a jury if you were having a case like

Mrs. Johnson, an automobile accident with injuries that she is claiming?

MRS. SLOVAK: Yes.

MR. RIPPEY: Judge, I think that's an improper question. I think the test is —

THE COURT: Yes, the personal view of a juror at best if the Court was guilty of asking that of this witness, this last witness, I do not believe you can ask a juror to put themselves in the place of that and do you feel like you could give a fair, just and impartial trial to both sides in the case?

MRS. SLOVAK: Yes, I do.

THE COURT: All right, go ahead, you can ask the next question." (Jury Voir Dire 24.)

Since counsel did ask this question and got an affirmative answer, and since Mrs. Slovak did not sit on the jury, there could be no possible error in this connection, much less reversible error. Petitioner's counsel did not seek to ask that question of any other juror thereafter.

With respect to asking jurors whether they would be prejudiced by the amount of measure of damages sought by plaintiff, the annotation at 82 A.L.R. 2d 1420 expresses the conclusion that, "The cases here discussed have generally recognized the rule that the trial judge ordinarily has a wide measure of discretion in controlling the scope of inquiry on voir dire and that the allowance or denial of a particular inquiry constitutes reversible error only where that discussion was clearly abused and prejudice resulted." There is no constitutional right to ask a jury panel questions which in effect would seek a commitment in advance as to how the juror would react to particular evidence.

A recent case as to voir dire concerning such matters as measures of damages is *Trautman v. New Rockford-Fessenden Co-op Tr. Assn.*, 181 N.W. 2d 754 (1970). In affirming judgment for defendants on the jury verdict, the court declares:

> "In the present case the plaintiffs wanted to determine the jurors' reactions to the possibility of returning a verdict of $293,000, if damages were found to that extent. We feel that the trial judge properly exercised his discretion when he sustained the defendants' objection to this question * * *.
>
> Questions to the prospective jurors concerning the possible dollar amount of any verdict are inappropriate as they may tend to influence the jury as to the size of the verdict, and may lead to the impaneling of a jury which is predisposed to finding a higher verdict by its tacit promise to return a verdict for the amount specified in the question during the voir dire examination. Henthorn v. Long, 146 W.Va. 636, 122 S.E. 2d 186 (1961); Paradossi v. Reinauer Bros. Oil Co., Inc., 53 N.J. Super. 41, 146 A. 2d 515 (1958); Goldstein v. Fendelman, 336 S.W. 2d 661 (Mo. 1960). It is well within the trial court's discretion to sustain objections to such questions. Chambers v. Bradley County, 53 Tenn. App. 455, 384 S.W. 2d 43 (1964)."

The voir dire examination here must be viewed as a whole. Petitioner's counsel examined the panel at length, for some 40 pages, and was allowed considerable latitude by the trial court. The limitations placed on him were within that court's sound discretion, and no showing of harm from the rulings made has even been attempted.

As to the claim that the restrictions on voir dire here violate constitutional guarantees, certainly no cases to that

effect are cited and again there are none. Cases merely holding that the Constitution guarantees the right of trial by jury have no application here, where Petitioner was afforded a trial by jury and by a jury not one of whose members has been shown to be biased or unfair and from which no classes were systematically excluded.

Petitioner has not shown, nor even sought to show, that any of the jurors who sat would have answered the inquiries here involved by revealing that they did have such unlikely prejudices, and did not even call them to the stand at the hearing on motion for new trial to attempt to do so. There is nothing to suggest that they probably were in fact prejudiced against the measures of damages sought by Petitioner, and no showing of probable harm.

CONCLUSION

This case does not warrant assumption of jurisdiction by the Supreme Court of the United States on certiorari. It is merely a suit between private parties seeking money damages for personal injury in which the controverted fact issues were decided against Petitioner and in favor of Respondents after full hearing before a jury not shown in any way to be less than completely fair and impartial. There are no novel or unusual points of law and no questions of public importance, and certainly the state court's opinion is not in conflict with any cases of this Honorable Court nor of the Courts of Appeal upon any constitutional

questions. We urge that the Petition for Certiorari should be denied or dismissed for want of jurisdiction because of its late filing.

Respectfully submitted,

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I, Royal H. Brin, Jr., attorney for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of January, 1972, I served a true and correct copy of the foregoing Brief in Opposition upon Petitioner by depositing same in the United States Post Office with first class postage prepaid, addressed to Mark Delk, 4314 Republic National Bank Tower, Dallas, Texas 75201, attorney of record for Petitioner.

ROYAL H. BRIN, JR.,
Attorney for Respondents.

APPENDIX

No. 17584

In the

Court of Civil Appeals

FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT DALLAS

BETTY JOHNSON,

Appellant,

v.

BELVA REED, et vir

Appellees.

ANSWER OF APPELLEES TO MOTION TO ISSUE CERTIFICATE OF NO MANDATE

TO SAID HONORABLE COURT:

In deference to the policy of the Court that answers should be filed to all motions, we make this reply to Appellant's Motion to Issue Certificate of No Mandate. However, we are somewhat at a loss as to anything we can say that will be of any assistance to the Court, since we do not understand the purpose or significance of such a certificate under the present circumstances.

The Motion of Appellant refers to Rules 445 and 509, T.R.C.P., and indeed the only situation in which we are acquainted with the use of such a certificate is that described in those Rules, but the circumstances in which such rules are applicable do not exist here. Rule 445 refers to cases

which have been reversed and remanded by a Court of Civil Appeals and where no mandate has been taken out within one year after such judgment became final. Of course, the present case was not reversed and remanded by the Court of Civil Appeals, but was rather affirmed. Moreover, far less than one year has passed since the judgment of this case became final by overruling of a motion for rehearing of application for writ of error.

Rule 509 also applies to a case that has been reversed and remanded, not to one that has been affirmed, and again has reference to the failure to take out a mandate within twelve months of the final action of the Supreme Court. The motion here is dated one day after the final action of the Supreme Court.

There is also some indication that Appellant considers that a certificate of no mandate would show that all state remedies have been exhausted, but of course it would not do so.

We can only conclude that Appellant is confused as to just what he wants from this Honorable Court, and that in any case a certificate of no mandate is neither necessary nor appropriate here.

Respectfully submitted,

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By .....

Royal H. Brin, Jr.
Attorneys for Appellees

A copy hereof is being furnished to Mark Delk, 4314 Republic National Bank Tower, Dallas, Texas 75201, the attorney of record for Appellant.